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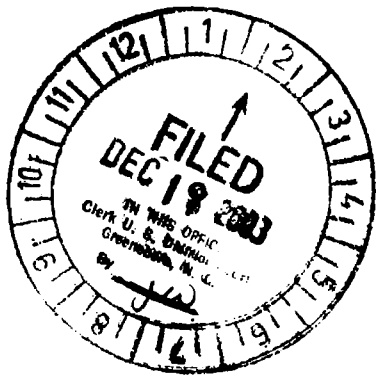
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

D. LAMAR DELOACH, WILLIAM G. HYMAN, HYMAN FARMS, INC., GUY W. HALE, JAMES R. SMITH, HOUSTON T. EVERETT, D. KEITH PARRISH,	)	
Plaintiffs,	)	
v.	)	1:00CV01235
PHILIP MORRIS COMPANIES, INCORPORATED, PHILIP MORRIS USA INC., PHILIP MORRIS INTERNATIONAL, INC., R.J.R. NABISCO HOLDINGS CORP., R.J. REYNOLDS TOBACCO HOLDINGS, INC., R.J. REYNOLDS TOBACCO COMPANY, B.A.T. INDUSTRIES, P.L.C., BRITISH AMERICAN TOBACCO COMPANY, INC., BATUS HOLDINGS INCORPORATED, BROWN & WILLIAMSON TOBACCO CORPORATION, LORILLARD TOBACCO COMPANY, LOEWS CORPORATION, UNIVERSAL LEAF TOBACCO CO., J.P. TAYLOR CO., INC., SOUTHWESTERN TOBACCO CO., INC., DIMON INC., STANDARD COMMERCIAL CORP.,	)	
Defendants.	)	



MEMORANDUM OPINION AND ORDER

OSTEEN, District Judge

I. INTRODUCTION

This class action litigation joined tobacco farmers against

tobacco product manufacturers and others in a cause of action referred to simply as a conspiracy to violate the antitrust laws. Essentially, the tobacco farmers contended and the manufacturers denied that a scheme was devised and implemented to deny farmers a fair price for their leaf poundage. The essence of the case theory was such that emotions on both sides could have reached dangerous levels and the scent of vindication could have overwhelmed the aroma of justice.

When the litigation was initiated and assigned, this court reviewed the pleadings and pondered whether the matter could be concluded within a decade. Yet, within a relatively short period, the parties, in the court's view, amazingly, except for one remaining defendant, have reached accord and settled their differences. It is worthy of note that there was a conspicuous absence of acrimony during the proceeding and in the aftermath of settlement deserving of acknowledgment by the court.

While this court recognizes that litigation belongs to the parties, it is undoubtedly true in most cases, and specifically in this matter, that lawyers set the tone and degree of professionalism under which the litigation proceeds. From prior knowledge of the attorneys chosen by the adversaries to lead their cause the court expected and now recognizes the superior professionalism and art of advocacy exhibited by the lawyers

representing Plaintiffs and Defendants. Their efforts, and to no lesser degree those of the mediator selected by the parties, have brought this mammoth litigation to a conclusion in which few, if any, animosities remain among the settling parties. A remarkable feat! The parties have maturely and responsibly acquitted themselves and the lawyers have exemplified the best tradition of the legal profession. As to the settling parties, the only remaining matter for the court's decision is the assessment of reasonable attorneys' fees.

The settlement among the consenting parties directed that Defendants should pay to Plaintiffs $200,000,000.00 in cash, along with payments totaling $11,800,000.00 for administration, research, education, and lobbying activities. Defendants committed to a leaf purchase agreement for the next 10 years from which Plaintiffs have a right to expect a potential value in excess of $1,000,000,000.00. The parties agreed that attorneys' fees for Plaintiffs' Co-Lead Counsel would not be part of the class settlement fund but would be separately determined by the court after confirmation of the settlement. No fund was created for attorneys' fees and no minimum or maximum limits were agreed upon. It was agreed that Defendants Philip Morris USA, Lorillard Tobacco Co., and Brown & Williamson would pay the ordered fees. The only limitation imposed upon the court was that the fees

should be reasonable. That determination is not a simple one.

One of the most comfortable tools with which lawyers and judges ply their trade is the certainty enunciated by precedent. Unfortunately, in this proceeding, we have reached the stage in which learned courts and articulate legal analysts have hurled conflicting conclusions upon the usually tranquil waters of constancy causing rippling and cross currents to the extent that finding a destination requires great caution and difficult reckoning. Nevertheless, it is such a journey which the parties have asked the court to undertake.

In briefs and in arguments, the parties have vigorously urged their positions. Plaintiffs' Co-Lead Counsel contend that a reasonable and just amount of $175,000,000.00 should be ordered to cover attorneys' fees and costs,[1] while Defendants urge that a maximum of $30,000,000.00 constitutes an amply reasonable reward. At first glance, these diverse positions seem staggering, but upon closer examination there is logic behind each position. Legal precedent exists upon which to extend coverage for both positions. Ironically, at times the parties cite the same legal authority in support of their opposing positions. Further, each

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[1] Any award of attorneys' fees will be split between the two co-lead firms, Howrey Simon Arnold & White, LLP, and Conlon, Frantz, Phelan & Pires, LLP, pursuant to a private agreement between the firms.

side has proffered its own expert in support of its contentions.

Weighing in for Plaintiffs' Co-Lead Counsel is Professor Arthur Miller of Harvard Law School and representing Defendants is Professor George Priest of Yale Law School. The court recognizes the eminent position of respect occupied by each, not only from the logic of each affidavit but from personal, professional knowledge and admiration gained for these well-known academics. For full disclosure, the court has heard and enjoyed their remarks at various and separate functions, none of which involved the subject matter of the present motion, and the court recognizes each as a distinguished scholar. Nevertheless, it is striking how these two learned gentlemen can view the law so differently. Not surprisingly, Professor Miller disdains the lodestar methodology in favor of the percentage of value approach for assessing reasonable attorneys' fees and concludes that the proper calculation for reasonable attorneys' fees would award Plaintiffs' Co-Lead Counsel the sum of $175,000,000.00. To put it another way, Professor Miller opines that such award would be well within the low limits of a percentage award. He predicts great conflict should the court attempt to adopt the lodestar methodology. On the other hand, Professor Priest, with equal logic, assures us that to use the percentage calculation would be inappropriate in absence of a common fund or a pre-litigation

agreement concerning the fees claimed. Professor Priest opines that to use the percentage method would create a real conflict between Plaintiffs and their attorneys which the court should not allow. He then predictably urges that the appropriate lodestar methodology will set reasonable attorneys' fees at $22,000,000.00, exclusive of expenses.

It, thus, becomes the court's duty to reconcile, or, at least consider, these seemingly irreconcilable disparate positions in order to assess reasonable attorneys' fees.

II. DISCUSSION

In awarding attorneys' fees to Plaintiffs' Co-Lead Counsel, the Settlement Agreement provides limited guidance, mandating only that the court award Plaintiffs' Co-Lead Counsel "their reasonable fees, costs and expenses." (Settlement Agreement § 2.3.) Many courts have confirmed that the touchstone of any award of attorneys' fees must be reasonableness. See, e.g., Fischel v. Equitable Life Assurance Soc'y, 307 F.3d 997, 1007 (9th Cir. 2002) (noting that in awarding fees, "reasonableness is the goal," and where a request leads to an unreasonable award, the court has abused its discretion); In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) (holding that an unreasonable fee request "must be trimmed back or rejected outright"); Fair Hous. Council of Greater Wash. v. Landow, 999

F.2d 92, 96 (4th Cir. 1993) (allowing "a district court to deny a request for attorneys' fees in its entirety when the amount of fees requested by the prevailing party is so outrageously excessive as to shock the conscience of the court").

A. Method of Awarding Fees

As previewed above, the court is faced with two methods for awarding attorneys' fees: the lodestar method and the percentage of the fund method. Under the lodestar method, the fee award is based on the reasonable hours expended multiplied by a reasonable hourly rate. Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 652 (4th Cir. 2002). The lodestar method is generally employed in cases that are based on a fee-shifting statute. In re General Motors Corp., 55 F.3d 768, 821 (3d Cir. 1995); Teague v. Bakker, 213 F. Supp. 2d 571, 582 (W.D.N.C. 2002); Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 250 (1986). In many of these cases, the lodestar method is preferred because the relief granted is of such small monetary value that a percentage fee for the attorneys would not provide adequate compensation. See Teague, 213 F. Supp. 2d at 582 (citing In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 732 (3d Cir. 2001)). Even in non-fee-shifting cases, the lodestar method may be used where the value of a recovery is so indeterminate as to impede the use of the percentage method. General Motors, 55

F.3d at 821.

The percentage method awards some fraction of the total recovery as an attorneys' fee, and is generally used in cases in which a common fund is created. Id.; Teague, 213 F. Supp. 2d at 582 (citing Cendant Corp., 243 F.3d at 732). A common fund exists where "the efforts of counsel have generated a 'common fund' from which the plaintiffs and counsel are to be compensated." Petruzzi's, Inc. v. Darling-Delaware Co., 983 F. Supp. 595, 602 (M.D. Pa. 1996); see also Brzonkala v. Morrison, 272 F.3d 688, 691 n.* (4th Cir. 2001) ("The 'common-fund' doctrine . . . applies, as its name suggests, in cases where an actual common fund has been created as a consequence of the litigation."); Brewer v. School Bd. of City of Norfolk, 456 F.2d 943, 948 (4th Cir. 1972) (allowing for an award of fees where a plaintiff has maintained a suit that generates a fund in which others share). In common fund cases, attorneys' fees are borne not by the defendants, "but by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund." In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1300 (9th Cir. 1994). The theory underlying the percentage method is that if the plaintiff class did not compensate its attorney, it would be unjustly enriched. General Motors, 55 F.3d at 821; Third Circuit Task Force, 108 F.R.D. at

250.

Plaintiffs' Co-Lead Counsel point out that in the Fourth Circuit, courts have discretion to choose between the lodestar method and the percentage method in common fund cases. See, e.g., Teague, 213 F. Supp. 2d at 583; In re Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 785-88 (E.D. Va. 2001). The trend, in this circuit and elsewhere, however, has been to select the percentage method in common fund cases. In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 215 (D. Me. 2003); Microstrategy, 172 F. Supp. 2d at 787; In re Vitamins Antitrust Litig., Misc. No. 99-197, MDL No. 1285, 2001 WL 34312839, at *3 (D.D.C. July 16, 2001). This trend, however, is largely inapposite in the present case because no common fund has been created. Under the settlement agreement, any award of fees by the court will not come out of Plaintiffs' recovery, but directly from Defendants. (Settlement Agreement § 2.3.)

Plaintiffs' Co-Lead Counsel suggest instead that this case is one where a "constructive common fund" has been created and as such attorneys' fees may be awarded under the percentage approach even though Defendants are paying the fees. See, e.g., Johnston v. Comerica Mortgage Corp., 83 F.3d 241, 246 (8th Cir. 1996) (holding that "the direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the

benefit analysis"); General Motors, 55 F.3d at 822; Vitamins, 2001 WL 34312839, at *2. A critical difference between the cited cases and the instant case is that, in each of the cited cases, the parties had reached a "clear sailing" agreement limiting the amount of fees that could be awarded. See Johnston, 83 F.3d at 246 ("The award to the class and the agreement on attorney fees represent a package deal."); General Motors, 55 F.3d at 803-04 (noting that the parties negotiated a fee agreement); Vitamins, 2001 WL 34312839, at *6. In this case, no such agreement exists.

Despite the lack of a common fund or constructive common fund, the court notes that this case does resemble a constructive common fund case in at least some respects. Even though Defendants did not reach an agreement on attorneys' fees with Plaintiffs' Co-Lead Counsel, they surely considered the impact of such fees when negotiating a settlement amount. From Defendants' perspective, the final settlement had to be somewhat lower than the maximum award amount Defendants were willing to pay, in order to accommodate the eventual award of attorneys' fees. Much like a common fund case, Defendants were prepared to make a large payment, some portion of which they undoubtedly realized would be allocated to Plaintiffs' Co-Lead Counsel as fees. In this sense, this case can be likened to a constructive common fund case.

Still, the parties' decision to allow the court to award

fees, rather than agreeing to a finite maximum amount, clearly removes this case from the common fund scheme. Cf. General Motors, 55 F.3d at 821 (holding that a separate fee agreement between the plaintiffs' counsel and defendants did not cause what was, in reality, a common fund case to become a fee-shifting case). Since no common fund or constructive common fund exists, the court concludes that it is more appropriate to use the lodestar methodology in awarding attorneys' fees in this case.[2]

B. Calculating the Lodestar

Having determined that the lodestar method is appropriate in this case, the court must next calculate the value of the lodestar. Generally, the lodestar is calculated by "multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 652 (4th Cir. 2002). In determining the reasonableness of the lodestar, courts must consider twelve factors originally identified by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc.,[3] 488 F.2d 714, 717-19 (5th Cir.

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[2] It should be noted, however, that the choice of the lodestar methodology does not mean that this case is a pure statutory fee-shifting case. This case was brought pursuant to statutes that allow fee shifting, but the present petition was brought pursuant to a private agreement among the parties. See Wing v. Asarco Inc., 114 F.3d 986, 989 (9th Cir. 1997).

[3] The twelve factors to be considered are (1) the time and labor actually expended by counsel; (2) the novelty and

1974) overruled on other grounds, Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989). See Daly v. Hill, 790 F.2d 1071, 1077 (4th Cir. 1986) (approving of the use of the Johnson factors). This inquiry is facilitated in the present case because Defendants do not object to the hourly rates claimed by Plaintiffs' Co-Lead Counsel in their proposed $18,585,383.00 lodestar. In addition, Defendants for the most part do not challenge the reasonableness of particular expenditures of time submitted by Plaintiffs' Co-Lead Counsel. Instead, Defendants seek to have large classes of work removed from the lodestar and redesignated as expenses.

1. Work by Plaintiffs' Co-Lead Counsel's Economic Consultants

Defendants first seek to exclude $2,453,767.50 from the lodestar, representing the amount billed by Plaintiffs' Co-Lead

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difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fee awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) overruled on other grounds, Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989).

Counsel for economic consultants. Had these consultants been outside experts employed by Plaintiffs' Co-Lead Counsel in preparation for trial, the court would quickly conclude that any payments made to them would be classified as costs rather than attorneys' fees. See, e.g., ABC, Inc. v. Primetime 24, 67 F. Supp. 2d 558, 564 n.1 (M.D.N.C. 1999) ("[T]he fees and expenses of outside, non-legal experts are traditionally not regarded as attorney's fees.") (citing Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 624 (4th Cir. 1978)). Plaintiffs' Co-Lead Counsel's consultants, however, worked for CapAnalysis, "a Howrey affiliate." (Pls.' Co-Lead Counsel's Reply Mem. at 17.) Plaintiffs' Co-Lead Counsel argue that as persons "whose labor contributes to the work product for which an attorney bills her client," Missouri v. Jenkins, 491 U.S. 274, 285, 109 S. Ct. 2463, 2470 (1989), the consultants' time must be included in the attorneys' fee award. In Jenkins, the Court did interpret the "reasonable attorney's fee" provision of 42 U.S.C. § 1988 as intended to compensate work by non-lawyers, including paralegals, secretaries, and librarians. Jenkins, 491 U.S. at 285, 109 S. Ct. at 2470. The Fourth Circuit has made clear, however, that it views differently "the fees and expenses of outside, non-legal consultants and experts" that are "traditionally not regarded as attorneys' fees, however essential their services may be to the

successful preparation and trial of a complex case." Wheeler, 585 F.2d at 624. Plaintiffs' Co-Lead Counsel assert, however, that their CapAnalysis consultants are different from the consultants most firms would hire since they are affiliated with the Howrey firm.

Plaintiffs' Co-Lead Counsel's response raises two concerns. First, the degree of connection between Howrey and CapAnalysis is uncertain. Plaintiffs' Co-Lead Counsel's brief refers to CapAnalysis as a Howrey affiliate, rather than describing the consultants as employees, as it presumably would for its paralegals. Furthermore, the fact that CapAnalysis has a unique name suggests that it is an independent entity rather than a collection of economic analysts who work for Howrey. Second, most law firms do not have in-house economic consultants. These firms instead rely on outside consultants, as Defendants did in this case. (See Pls.' Co-Lead Counsel's Reply Mem. at 17 n.25.) It would be unfair to count Howrey's consultants' fees as attorneys' fees subject to a potential multiplier while merely reimbursing the consultants' fees incurred by other firms who hire outside consultants. For these reasons, the court agrees with Defendants that $2,453,767.50 in consulting costs must be counted only as expenses, and not as part of the lodestar.

2. Work by Plaintiffs' Co-Lead Counsel's Paralegals

Defendants have also sought to exclude $757,512.50, representing paralegal and other non-attorney work, from the lodestar. Defendants cite some district court cases in which attorneys' fees were multiplied while paralegal billing was treated merely as an expense. See, e.g., In re Unisys Corp. Retiree Med. Benefits ERISA Litig., 886 F. Supp. 445, 482 (E.D. Pa. 1995); Purdy v. Security Sav. & Loan Ass'n, 727 F. Supp. 1266, 1278 (E.D. Wisc. 1989); Superior Beverage Co. v. Owens-Illinois, Inc., No. 83C512, 1984 WL 1395, at *3 (N.D. Ill. Oct. 31, 1984). As noted above, however, the Supreme Court in Missouri v. Jenkins held the "reasonable attorney's fee" of 42 U.S.C. § 1988 to include work done by paralegals. 491 U.S. 274, 285, 109 S. Ct. 2463, 2470 (1989). The Fourth Circuit has likewise held that paralegal time is to be included in an award of attorneys' fees. Herold v. Hajoca Corp., 864 F.2d 317, 322 (4th Cir. 1988) (citing Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496, 1510 (4th Cir. 1988)). This court sees no reason to treat paralegal fees differently in this case than in the § 1988 context. As such, the court concludes that billed time for paralegals should not be excluded from Plaintiffs' Co-Lead Counsel's lodestar.

3. "Unrelated" Attorney Work

Defendants also argue for the exclusion of $266,056.50 for

work they contend was unrelated to the instant litigation. Among the types of activities Defendants seek to exclude are lobbying efforts regarding a quota buyout, work with the U.S. Department of Agriculture regarding nitrosamines, and the investigation of potential claims by or against warehousemen.

The lobbying efforts with regard to the quota buyout were directly relevant to the issues in this case and represent one important aspect of the settlement agreement. Furthermore, the Fourth Circuit has approved of including related lobbying in the lodestar. See DeMeir v. Gondles, 676 F.2d 92, 93 (4th Cir. 1982). Therefore, time spent on the buyout lobbying, being closely related to this case, should not be excluded.

As for the other purportedly unrelated time, Defendants cite one case for the proposition that unrelated or unnecessary time should be excluded from the lodestar. Johnson v. State of R.I., Dept. of Corr., No. C.A. 98-266T, 2000 WL 303305, at *8-9 (D.R.I. Mar. 22, 2000). The court agrees with Defendants' contention as a general matter. Nevertheless, the court declines to exclude any of the billing entries at issue here. Plaintiffs' Co-Lead Counsel's work with the USDA, investigation of potential claims by warehousemen, and work on seeking reimbursement for the lead plaintiffs are all activities related to this case. As such, billed time for these matters should not be excluded from the

lodestar.

4. Attorney Solicitation Work

Defendants next seek to exclude $208,310.00 representing fees billed while Plaintiffs' Co-Lead Counsel solicited plaintiffs to join the suit. At least one court has held that "hours spent looking for and soliciting potential plaintiffs should not [be] included in the time billed." ACLU of Ga. v. Barnes, 168 F.3d 423, 435 (11th Cir. 1999). The Barnes court went on to recognize, however, that "hours billed for interviewing, corresponding, and meeting with potential plaintiffs present a closer question," because such time may well produce factual information which can be useful at trial. Id. at 436. In that case, the plaintiffs were unable to carry their burden of demonstrating which potential plaintiff contacts were used to generate information and which were used for solicitation, so the court excluded all of the disputed hours.

In this case, Defendants seek to exclude billings for time spent, primarily by the Pires firm, meeting with potential plaintiffs in 1999 and 2000. Plaintiffs' Co-Lead Counsel retort that these meetings were important to "gain acceptance of" and "build support" for the litigation, as well as to keep the class informed and free from any intimidation induced by Defendants. (See Pls.' Co-Lead Counsel Reply Mem. at 17 n.22.) Plaintiffs'

Co-Lead Counsel do not deny that these meetings were used in an effort to solicit potential plaintiffs, and present no evidence to show that these meetings were used for gathering factual information for the litigation. Without these showings, the court agrees with the reasoning in Barnes and will exclude from the lodestar $208,310.00 representing time spent soliciting potential plaintiffs. The court will, however, treat this amount as costs for reimbursement.

5. Other Attorney Work

Defendants also seek to exclude two other classes of work performed by attorneys: clerical work and work represented by inadequate or erroneous entries. The court is inclined to agree with Defendants that clerical work should generally not be included in an award of attorneys' fees. In Harris v. L & L Wings, Inc., the Fourth Circuit upheld the district court's award of attorneys' fees, noting that time spent on clerical work had been excluded from the lodestar. 132 F.3d 978, 985 (4th Cir. 1997). Here, Defendants point to attorney tasks including copying, opening mail, filing, and data entry which they argue should have been performed by secretaries or other support personnel. Resolving this question, however, would require the court to conduct a line-by-line inquiry into voluminous attorney billing records, something the court is loathe to do. See Wilson

v. McClure, 135 F. Supp. 2d 66, 71 (D. Mass. 2001) ("[T]he Court is not inclined to analyze [the attorney's] logged hours in an effort to weed out each hour spent on unsuccessful efforts."). Besides the court's reluctance to entangle itself in the time records, there is also no clear means by which to distinguish hours for clerical work that might be permissible for attorneys, rather than staff, to bill. For example, there is no consistent way for the court to decide that one hour of copying by an attorney is impermissible and another is not. For this reason, the court declines to exclude the "clerical" time from the calculation of the lodestar.

Defendants also point to entries that they claim are inadequate or erroneous. As to the inadequate records, Defendants point to entries described as "miscellaneous work" or "miscellaneous discussions." Still, when Defendants list these entries in their exhibits, many of these records are at least detailed enough to clarify that the billing attorney was engaged in "trial preparation" or "discussions with other attorneys." (Defs.' Resp. Opp'n Pls.' Co-Lead Counsel Pet. Ex. 8.) Without an extremely detailed and perhaps futile investigation into each entry, the court can see no method to detect the few potentially impermissible billings that may be inadvertently hidden among the many valid ones. For this reason the court will not exclude the

purportedly inadequate entries.

Defendants also point to some entries they contend are erroneous, mostly because entries of the same description appear twice in one day. The court has no reason to conclude an attorney could not have, for example, performed the same task twice in one day, spending the exact same amount of time on the matter at each point. As such, the court will not exclude these entries as erroneous.

One entry, however, is clearly erroneous. In a billing entry from July 7, 2000, one timekeeper billed 35 hours at $240 per hour in a single day. Although some amount of time may have been worked that day, this amount of time is clearly incorrect. Having no way to discern what amount of time would be accurate, the court will exclude this entire entry in the amount of $8,400.00 from both the lodestar and costs.

6. Reduction to Account for Claims against RJR

Lastly, Defendants seek to reduce the lodestar by 25% to represent work done by Plaintiffs' Co-Lead Counsel in preparation for litigation against R.J. Reynolds Tobacco Company ("RJR"), a primary defendant that did not settle. Defendants' 25% figure is based on RJR's share of the cigarette market. Plaintiffs' Co-Lead Counsel maintain that they excluded from the lodestar any work done in preparation for litigation against RJR after the

settlement received preliminary approval. In addition, Plaintiffs' Co-Lead Counsel also argue that all of the pre-settlement work collectively led to the settlement. For example, they maintain that no settlement would have been achieved had Plaintiffs not succeeded at the class certification stage or failed to defeat Defendants' motion to dismiss. Finally, Plaintiffs' Co-Lead Counsel argue that any reduction of the lodestar for RJR work would be arbitrary since it is not possible to segregate RJR work from non-RJR work.[4]

The court agrees with much of what Plaintiffs' Co-Lead Counsel have suggested. Most of the pre-settlement work in this case was not directed toward one Defendant or another. Getting past the class certification stage and defeating Defendants' motion to dismiss were essential to creating an environment where this settlement would be feasible. In addition, this case is at its core a conspiracy case. As such, if Defendants are liable, they are each equally liable for their wrongful agreement. For these reasons, the court will not make any reduction of the lodestar at this time. If, however, a verdict is returned against RJR, the court will consider assessing RJR its share of

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[4] Alternatively, Plaintiffs' Co-Lead Counsel also contend that if an adjustment was made for RJR work, it should be a 13% reduction, representing RJR's share of the leaf market, as opposed to the cigarette market.

the attorneys' fees as awarded in this order. To that end, the court will determine whether the settling Defendants will be subrogated to some amount of costs paid for the benefit of RJR.

7. Calculation of the Lodestar

Plaintiffs' Co-Lead Counsel proposed a lodestar of $18,585,383.00 in addition to expenses of $1,806,930.00. Because the court has concluded that the work of Howrey's economic consultants should be treated as costs rather than attorneys' fees, the lodestar is reduced by $2,453,767.50. The lodestar is further reduced by excluding Plaintiffs' Co-Lead Counsel's solicitation expenses of $208,310.00. Finally, the lodestar is reduced by $8,400.00 for a single erroneous entry. The resulting adjusted lodestar is $15,914,905.50. Plaintiffs' Co-Lead Counsel's cost figure is increased by the amount spent on consultants and the time spent soliciting plaintiffs, resulting in an adjusted cost amount of $4,469,007.50.

C. Multiplier

Defendants vigorously argue that the court, having chosen the lodestar methodology, should award the lodestar figure alone as an attorneys' fee without any enhancement. In City of Burlington v. Dague, the Supreme Court held that there is a "'strong presumption' that the lodestar represents the 'reasonable' fee." 505 U.S. 557, 562, 112 S. Ct. 2638, 2641

(1992). In an earlier case, the Fourth Circuit limited enhancements of the lodestar to "exceptional circumstances," holding that "[a] fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall. In 'exceptional circumstances,' this presumptively fair lodestar figure may be adjusted to account for results obtained and the quality of representation." Daly v. Hill, 790 F.2d 1071, 1078 (4th Cir. 1986). Moreover, in Dague, the Court went on to proscribe any enhancement of the lodestar for contingency in statutory fee-shifting cases. 505 U.S. at 567, 112 S. Ct. at 2643-44.

As noted above, however, this case is not a pure statutory fee-shifting case. Although this suit was brought pursuant to a statute that allows an award of attorneys' fees to the prevailing party, the award in the present proceeding is pursuant to an agreement between the parties. See Wing v. Asarco Inc., 114 F.3d 986, 989 (9th Cir. 1997) (noting that the case did not present the same situation as Dague, since the award of fees was pursuant to a contract). The court believes this case is distinguished by the "exceptional circumstances" that render a multiplier of the lodestar appropriate.

Defendants argue that if any multiplier is permitted, it should be between one and two. Defendants cite many cases in

which courts have applied such relatively modest multipliers. See, e.g., ABC, Inc v. Primetime 24, 67 F. Supp. 2d 558, 567 (M.D.N.C. 1999) (multiplier of 1); Middleton v. Russel Group, Ltd., No. 2:95CV630, 1998 WL 34029422, at *2 (M.D.N.C. Jul. 10, 1998) (multiplier of 1); Braun v. Culp, No. C-84-455-G, 1985 WL 5857, at ¶ 21 (M.D.N.C. Apr. 26, 1985) (multiplier of 2); McBroom v. Western Elec. Co., 526 F. Supp. 831, 835 (M.D.N.C. 1981) (multiplier of 1); Clark v. Cameron-Brown, Corp., No. C-75-65-G, 1981 WL 1637, at *4 (M.D.N.C. April 6, 1981) (multiplier of 2). Nevertheless, Plaintiffs' Co-Lead Counsel cite cases which approve of multipliers between two and three. See, e.g., In re Cendant Corp PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001) (recommending that on remand the district court ensure that its multiplier is no greater than 3); In re Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 790 (E.D. Va. 2001) (approving a multiplier of nearly 2.6); In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 2000 WL 204112, at *3 (approving a multiplier of 2.08). In addition, Plaintiffs' Co-Lead Counsel cite some cases in which multipliers have been much higher. See, e.g., Manners v. American Gen. Life Ins. Co., No. CIV.A. 3-98-0266, 1999 WL 33581944, at *31 (M.D. Tenn. 1999) (approving a multiplier of 3.8); In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (describing a multiplier of

3.97 as "not unreasonable in this type of case"); In re RJR Nabisco, Inc. Sec. Litig., No. 88 CIV. 7905, 1992 WL 210138, at *5 (S.D.N.Y. Aug. 24, 1992) (permitting a multiplier of 6); Cosgrove v. Sullivan, 759 F. Supp. 166, 167, 169 (S.D.N.Y. 1991) (allowing a multiplier of 8.7).

It is not clear however, that any of the cases cited by the parties cover the situation found in this case. Defendants cite true multiplier cases and note their small multiplier. These cases, however, are generally civil rights cases with very small recoveries for the plaintiffs. Plaintiffs' Co-Lead Counsel, on the other hand, point to large antitrust or securities settlements as being more instructive in this case. The problem with their approach is that those cases did not in fact use the lodestar method in awarding fees. Rather, they used the percentage method and then cross-checked the percentage result against the lodestar and multiplier. Neither set of cases is entirely analogous to the situation in this case.

In awarding attorneys' fees, the Fourth Circuit has instructed that the single most important factor is the results obtained for the plaintiff. McDonnell v. Miller Oil Co., Inc., 134 F.3d 638, 641 (4th Cir. 1998) (citing Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 1941 (1983)). Results are such an important factor in awarding fees that when a plaintiff

has achieved only modest success, the court may discount the fees that would normally be awarded to counsel. Id. (citing Hensley, 461 U.S. at 436, 103 S. Ct. at 1941). The results in this case, however, were far from modest. Facing the dedicated and diligent opposition of Defendants, Plaintiffs' Co-Lead Counsel achieved a remarkable result for the class. Indeed, this settlement was the first class action antitrust settlement (and the largest class action settlement of any kind) by these Defendants. Besides the significant cash payment, the value of the leaf commitment by Defendants cannot be overstated. The commitment guarantees that Defendants will remain in the U.S. tobacco market, purchasing at least 405 million pounds of tobacco annually for 10 to 12 years. Moreover, the fact there were no objections to the settlement and only 161 timely opt-outs testifies to the value of the settlement in the eyes of the class. These impressive results lead the court to conclude that a higher-than-usual multiplier is warranted in this case.

This settlement could not have been achieved without the valiant work of the lawyers on both sides. Plaintiffs' Co-Lead Counsel, in particular, faced the daunting task of litigating against an industry that is one of the most ardently protective of its rights and well-represented in the nation with no guarantee that their investments of time and effort would be

repaid. Defendants appropriately undertook a vigorous defense throughout the litigation. The point of this mention is not to disparage Defendants' counsel—on the contrary, it is to recognize the daunting task and to reinforce the challenges faced by Plaintiffs' Co-Lead Counsel in litigating against diligent and vigorous opponents.

Moreover, Plaintiffs' Co-Lead Counsel reached this result without the benefit of assistance from numerous other law firms. In many similar cases, numerous law firms join the case by filing related actions that are eventually consolidated into a single case. The fact that no additional firms joined this case may show that the legal community thought this case against these defendants was untenable. It also reinforces the value of the settlement achieved for the class given that Plaintiffs' Co-Lead Counsel were not assisted by so great a number of additional lawyers.

The court also notes the important public policy in securing private enforcement of the antitrust laws. The Supreme Court has noted that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Mfg. Co. v New Jersey Wood Finishing Co., 381 U.S. 311, 318, 85 S. Ct. 1473, 1477 (1965). In similar cases, courts have enhanced the

fee award to counsel in order to entice future counsel to assist plaintiffs in bringing meritorious claims. See In re Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (permitting the use of a multiplier in a securities case "to provide an incentive for competent lawyers to pursue such actions in the future").

Based on the preceding discussion, the court concludes that a multiplier should be applied in this case, and that it should be higher than the range of 1 to 2 proposed by Defendants. A multiplier of 4.45, in conjunction with an adjusted lodestar of $15,914,905.50, results in a fee award of $70,821,329.48. This figure represents a reasonable fee for the services provided by Plaintiffs' Co-Lead Counsel in this case. First and foremost, this fee properly compensates Plaintiffs' Co-Lead Counsel for the exceptional result they achieved for the class. In addition, it recognizes the difficulties faced by Plaintiffs' Co-Lead Counsel in pursuing this litigation. Moreover, the result is more closely in line with other comparably-sized antitrust cases than Defendants' suggested award.[5] Finally, it is worth noting that,

[5] Indeed, at 5.9% of the settlement, it is arguable that had a strict percentage method been used in this case, the award made by the court would be low in comparison to other similar cases. This award, however, was made according to the lodestar methodology, and does represent a reasonable fee.

at 5.9%, the award made today very closely approximates the agreement reached between the Pires firm and the original 6,000 plaintiffs who joined the suit, who agreed to pay 5% of any recovery to the firm.

III. CONCLUSION

For the reasons stated herein,

IT IS ORDERED that Plaintiffs' Co-Lead Counsel shall receive $70,821,329.48 in attorneys' fees and $4,469,007.50 in costs.

This the 19th day of December, 2003.

United States District Judge